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TAN CHIN HOCK & ORS v. METRO LAKSANA PROPERTIES SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
VERNON ONG LAM KIAT JCA
B HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEALS NO: B-02(NCVC)(W)-2218-10-2017
& B-02(NCVC)(W)-2219-10-2017]
15 MARCH 2019

C ***CONTRACT:*** *Termination – Validity – Joint venture agreement – Whether notice of termination issued by developer pursuant to agreed clauses in agreement – Whether notice of termination given out of time – Whether termination bad in law and in fact – Whether notice of termination invalid – Effect of – Whether developer entitled to refund of deposit*

D The appellants ('defendants') were co-proprietors of a plot of land. The respondent ('plaintiff'), pursuant to a joint venture agreement ('JVA') dated 24 January 2013 with the defendants, agreed to develop the land into a mixed development and to apply to the relevant authorities for the necessary approvals. It was also agreed that the defendants shall be entitled to the units E of the development according to the First Schedule of the JVA. On 15 March 2013, the plaintiff paid the deposit sum of RM2 million to the defendants. On 12 April 2013, the plaintiff and the defendants entered into a supplemental joint venture agreement ('SJVA') where certain additional clauses were incorporated and variations made to some clauses under the F JVA. However, on 27 April 2016, the plaintiff issued a notice of termination of the JVA and the SJVA and demanded for the refund of the RM2 million deposit. The defendants disputed the plaintiff's purported termination of the JVA and SJVA. Hence, the action by the plaintiff for a declaration that the JVA and SJVA were lawfully terminated and for consequential reliefs whilst G the defendants counterclaimed for specific performance of the JVA and SJVA and alternatively, for damages. The Judicial Commissioner ('JC') allowed the plaintiff's claim and declared that the JVA and SJVA were validly terminated and further ordered the defendants to refund the deposit of RM2 million to the plaintiff. The defendants' counterclaim was also allowed and damages were ordered to be assessed against the plaintiff pursuant to cl. 9.5 H of the JVA. Dissatisfied, the plaintiff and the defendants appealed. In essence, the defendants' arguments were mounted on the premise that the JC had failed to appreciate (i) the application of cl. 9.1 and 9.2 as opposed to cl. 10.7 of the JVA; and (ii) the scope and application of cl. 9.3 of the JVA.

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Held (allowing defendants' appeal and plaintiff's appeal)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) Pursuant to cl. 9.3 of the JVA, the notice of termination must be given 'during a period not exceeding 30 days before the said expiry of the commencement date.' On the facts, the notice of termination must be given by the plaintiff to the defendants on or by August 2015. However, the notice of termination was only given on 27 April 2016 – seven months after the expiry of the commencement date. The notice of termination, given out of time, was bad in law and in fact and was therefore invalid. Further, it was not open to the plaintiff to change their stance and seek to rely on cl. 10.7 of the JVA as the premise for the issuance of the notice of termination as cl. 10.7 was not pleaded in the plaintiff's pleadings. (paras 19 & 21)

(2) Clause 9.3 provides that the deposit sum shall be refunded to the plaintiff within six months after receipt of the plaintiff's notice of its intention not to continue with the development 'provided such a written notice shall be given during a period not exceeding 30 days before the said expiry of the commencement date'. As the notice of termination was issued out of time, the plaintiff, being party in breach could not avail itself of the benefit of cl. 9.3 so as to be entitled to the refund of the deposit sum. (para 22)

(3) Clause 9.2 clearly provided that in the event of termination of the JVA pursuant to cl. 9.1 neither party should have any further rights and/or claims against the other in respect of the JVA. Whereas cl. 9.5 could only apply after the development order and building plans had been approved by the relevant authorities. The defendants, *qua* proprietors of the land, forfeited the RM2 million deposit sum paid by the plaintiff and did not lose the ownership and possession of their land. Hence, the order of the JC allowing the defendants' counter-claim and for damages to be assessed was set aside. (paras 24 & 25)

Bahasa Malaysia *Headnotes*

Perayu-perayu ('defendan-defendan') adalah pemilik bersama sebidang tanah. Responden ('plaintif'), menurut satu perjanjian usaha sama ('JVA') bertarikh 24 Januari 2013 dengan defendan-defendan, bersetuju membangunkan tanah itu sebagai pembangunan bercampur dan memohon pada pihak-pihak berkuasa yang relevan untuk kelulusan-kelulusan yang perlu. Disetujui juga bahawa defendan-defendan akan berhak mendapat unit-unit dalam pembangunan itu menurut Jadual Pertama JVA. Pada 15 Mac 2013, plaintif membayar jumlah deposit RM2 juta kepada defendan-

defendan. Pada 12 April 2013, plaintif dan defendan-defendan memasuki perjanjian usaha sama tambahan ('SJVA') dan klausa-klausa tambahan tertentu dimasukkan dan perubahan dibuat pada beberapa klausa bawah JVA. Walau bagaimanapun, pada 27 April 2016, plaintif mengeluarkan notis penamatan JVA dan SJVA dan menuntut pemulangan deposit RM2 juta. Defendan-defendan mempertikaikan penamatan JVA dan SJVA tersebut oleh plaintif. Oleh itu, tindakan ini oleh plaintif untuk deklarasi bahawa JVA dan SJVA ditamatkan secara sah dan untuk relief-relief berikutannya manakala defendan-defendan menuntut balas untuk pelaksanaan spesifik JVA dan SJVA dan secara alternatif, untuk ganti rugi. Pesuruhjaya Kehakiman ('PK') membenarkan tuntutan plaintif dan mengisytiharkan JVA dan SJVA ditamatkan secara sah dan selanjutnya memerintahkan defendan-defendan memulangkan deposit RM2 juta kepada plaintif. Tuntutan balas defendan-defendan juga dibenarkan dan ganti rugi diperintahkan agar ditaksir terhadap plaintif menurut kl. 9.5 JVA. Tidak berpuas hati, plaintif dan defendan-defendan merayu. Pada asasnya, hujahan defendan-defendan adalah berasaskan kegagalan PK mempertimbangkan (i) aplikasi kl. 9.1 dan 9.2 berbanding kl. 10.7 JVA; dan (ii) skop dan aplikasi kl. 9.3 JVA.

Diputuskan (membenarkan rayuan defendan-defendan dan membenarkan rayuan plaintif)

Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Menurut kl. 9.3 JVA, notis penamatan mesti diberi 'during a period not exceeding 30 days before the said expiry of the commencement date.' Berdasarkan fakta, notis penamatan mesti diberi oleh plaintif kepada defendan-defendan pada atau sebelum Ogos 2015. Walau bagaimanapun, notis penamatan hanya diberi pada 27 April 2016 – tujuh bulan selepas tarikh permulaan tamat. Notis penamatan, yang diberi luar masa, cacat di sisi undang-undang dan fakta dan oleh itu, tidak sah. Selanjutnya, plaintif tidak boleh menukar hujahan dan memohon untuk bersandar pada kl. 10.7 JVA sebagai asas pengeluaran notis penamatan kerana kl. 10.7 tidak diplidkan dalam pliding plaintif.

(2) Klausa 9.3 memperuntukkan bahawa jumlah deposit sepatutnya dipulangkan kepada plaintif dalam tempoh enam bulan selepas notis plaintif tentang niatnya untuk tidak meneruskan dengan pembangunan 'provided such a written notice shall be given during a period not exceeding 30 days before the said expiry of the commencement date'. Oleh sebab notis penamatan dikeluarkan luar masa, plaintif, sebagai pihak yang melanggar tidak boleh mendapat faedah kl. 9.3 untuk berhak mendapat pemulangan jumlah deposit.

(3) Klausa 9.2 jelas memperuntukkan bahawa jika berlaku penamatan JVA menurut kl. 9.1 tiada pihak yang boleh mempunyai apa-apa hak dan/atau tuntutan terhadap pihak yang satu lagi berhubung JVA. Sementara itu, kl. 9.5 hanya boleh diguna pakai selepas perintah pembangunan dan pelan bangunan diluluskan oleh pihak-pihak berkuasa yang relevan. Defendan-defendan, sebagai pemilik-pemilik tanah, merampas jumlah deposit RM2 juta yang dibayar plaintif dan tidak kehilangan hak milik dan milikan tanah mereka. Oleh itu, perintah PK membenarkan tuntutan balas defendan-defendan dan untuk ganti rugi ditaksirkan adalah diketepikan.

Case(s) referred to:
Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd [2017] 5 CLJ 58 CA ***(refd)***

(Civil Appeal No: B-02(NCVC)(W)-2218-10-2017)
For the appellant - Amarjeet Singh & Avtar Singh; M/s Zubeda & Amarjeet
For the respondent - Lai Yee Fan, SY Lai & Ong Siew Ming; M/s SY Lai & Assocs

(Civil Appeal No: B-02(NCVC)(W)-2219-10-2017)
For the appellant - Lai Yee Fan, SY Lai & Ong Siew Ming; M/s SY Lai & Assocs
For the respondent - Amarjeet Singh & Avtar Singh; M/s Zubeda & Amarjeet

[Editor's note: Appeal from High Court, Shah Alam; Suit No: BA-22NCVC-42-01-2017 (overruled).]

Reported by S Barathi

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] The action in the court below related to the validity of a joint venture agreement ("JVA") and a supplemental joint venture agreement ("SJVA"). At the High Court, the plaintiff sought for a declaration that the JVA and SJVA were lawfully terminated and for consequential relief whilst the defendants counter-claimed for specific performance of the JVA and SJVA and in the alternative damages.

[2] At the conclusion of a full trial, the learned Judicial Commissioner (JC) allowed the plaintiff's claim and declared the JVA and SJVA validly terminated and further ordered the defendants to refund the deposit of RM2 million to the plaintiff. However, the learned JC also allowed the defendants' counterclaim and ordered damages to be assessed against the plaintiff pursuant to cl. 9.5 of the JVA. The plaintiff and the defendants being dissatisfied with the decision of the learned JC have both appealed to the Court of Appeal.

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Salient Facts

[3] The defendants are co-proprietors of a plot of land in Ulu Langat, Selangor measuring 1.8843 hectares ("the land"). Pursuant to the JVA dated 24 January 2013 entered into between the defendants and the plaintiff, the plaintiff agreed to develop the land into a mixed development consisting of residential and/or commercial buildings together with all public facilities and infrastructure and to apply to the relevant authorities for the necessary approvals. It was also agreed that the defendants shall be entitled to the units of the development according to the First Schedule of the JVA.

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[4] The plaintiff undertook to complete the development within six years from the date the duly executed power of attorney is delivered to the plaintiff. In the event of the occurrence of any events whatsoever not due to the plaintiff's fault which results in the delay of completion of the development within the completion date, the development shall be extended for a period not exceeding 12 months.

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[5] Pursuant to a power of attorney dated 5 February 2013 ("first PA"), the first and fifth defendants (the authorised donors of the co-proprietors) appointed certain individuals nominated by the plaintiff as the attorneys for the defendants for the purpose of implementing the development of the land and to do specific things and to execute the requisite documents relating thereto.

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[6] On 15 March 2013, the plaintiff paid to the defendants the deposit sum of RM2 million pursuant to the JVA.

[7] On 12 April 2013 the plaintiff and the defendants entered into the SJVA whereby certain additional clauses were incorporated and variations made to some clauses under the JVA. The additional clauses and variations insofar as they relate to this appeal are as follows:

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(i) Clause 9.3 was varied so that in the event of the non-approval of the application to the relevant authorities resulting in the plaintiff's failure to commence the construction works before the commencement date, the plaintiff shall be entitled to give written notice to the defendants of its intention not to continue with the development. Upon receipt of such written notice, the defendants shall refund the deposit sum to the plaintiff within six months;

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(ii) A new cl. 9.5 was added to the effect that in the event of the plaintiff's breach of the JVA, the defendants shall be entitled to claim damages to the extent of the sum equivalent to the market value of the units of the defendants' entitlement under the JVA.

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[8] On 1 August 2013, the first and fifth defendants under another power of attorney ("second PA") appointed the plaintiff company as the attorney for all the defendants for the purpose of implementing the development of the land and to do specific things and to execute the requisite documents relating thereto.

[9] On 3 April 2015, IKRAM (Centre for Engineering Forensic & Consultancy Services) wrote a letter to the Majlis Perbandaran Kajang with comments on the Pelan Kerja Tanah and Laporan Geoteknikal; the letter was copied to the plaintiff. IKRAM *inter alia* requested the plaintiff to review the application and to obtain the written approvals from the relevant governmental agencies and the proprietors of the adjacent or adjoining lands for all earth works that would be carried out at the boundary of the land.

[10] Pursuant thereto, the plaintiff's attempts to obtain the written approvals from the proprietors of the three affected adjoining lands produced mixed results. The proprietor of Lot 2002 had no objections subject to the plaintiff obtaining the written approvals from the other two land owners. The proprietor of Lot 7773 imposed unreasonable conditions which were rejected by the plaintiff. The proprietor of Lot 3369 did not respond to the plaintiff's request.

[11] On 27 April 2016, the plaintiff through their solicitors issued a notice of termination of the JVA and the SJVA and demanded for the refund of the RM2 million deposit. In response, the defendants through their solicitors' letter dated 25 October 2016 disputed the plaintiff's purported termination of the JVA and SJVA.

Findings Of The High Court

[12] In arriving at her decision, the learned JC made the following key findings:

(i) In failing to obtain the approval from the relevant authority to develop the land, the plaintiff committed a breach of cl. 9.1(i) of the JVA;

(ii) The basis of the plaintiff to terminate the JVA is unacceptable because the plaintiff failed to exhaust its avenues to obtain the consent of the adjoining landowners;

(iii) The JVA was terminated pursuant to cl. 9.1 of the JVA;

(iv) Pursuant to cl. 9.3 of the JVA, the plaintiff is entitled for the refund of the deposit sum of RM2 million; and

(v) Due to the plaintiff's aforesaid breach of the JVA, the defendants are entitled to claim for damages under cl. 9.5.

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Submission Of Parties

[13] Learned counsel for the defendants advanced the following arguments:

(a) the commencement date for the development under the JVA should fall in April 2013 or at the latest in August 2013 when the first PA or second PA was created and delivered to the plaintiff. Under the JVA, the two-year period for the commencement of the development would have expired at the earliest in April 2015 or at the latest in August 2015. Therefore, the plaintiff's notice of termination dated 27 April 2016 was issued after the period for the commencement date had lapsed;

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(b) the plaintiff being a party in breach of a contract is not entitled to terminate the JVA and SJVA;

(c) the plaintiff did not appeal against the learned JC's finding that the plaintiff's failure to obtain the adjoining land-owners' consent was not a genuine ground which did not justify the termination under cl. 9.1;

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(d) clause 9.1 only gave the defendants and not the plaintiff the right to terminate the JVA if the plaintiff committed a breach of the JVA;

(e) the learned JC erred in relying on cl. 9.3 of the JVA (varied by cl. 2.11 of the SJVA) as it is not intended to cover the situation where the plaintiff can terminate the JVA. The only provision for termination by the plaintiff is cl. 10.7 of the JVA in the event of planning approvals and written consents not being obtained within the periods stipulated in clauses 3.3, 3.4 and 3.5 of the JVA;

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(f) clause 9.3 is inapplicable so as to entitle the plaintiff to the refund of the deposit sum;

(g) the learned JC ignored the plaintiff's pleaded case which relied on cls. 9.1 and 9.3 of the JVA;

(h) in all the circumstances, the learned JC correctly relied on new cl. 9.5 in allowing the defendants' counterclaim.

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[14] In reply, learned counsel for the plaintiff submitted as follows:

(a) The consent of the adjoining landowners had to be obtained without which the development order for the development of the lands could not be issued;

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(b) Even though cl. 10.7 of the JVA was not pleaded, the plaintiff is relying on cl. 9.1 under which the JVA "shall be terminated" due to the plaintiff's breach of its obligations under the JVA (*Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd* [2017] 5 CLJ 58; [2017] 3 MLJ 763);

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(c) It is not disputed that since the plaintiff failed to obtain all the approvals pursuant to cl. 3 of the JVA within the stipulated time, the JVA and SJVA have thereby become null and void by virtue of cl. 9.2 of the JVA. As such, it also follows that the defendants are obliged to refund the deposit sum to the plaintiff under cl. 9.3 of the JVA and cl. 2.11 of the SJVA pursuant to the notice of termination;

(d) Clauses 9.1 and 9.2 applied equally to both the plaintiff and the defendants so that the plaintiff was entitled to issue the notice of termination in the circumstances;

(e) The learned JC erred in allowing the defendants' counterclaim under cl. 9.5 of the JVA because it was not pleaded; and

(f) The defendants failed to prove their claim for damages and as such, it was wrong for the learned JC to order damages to be assessed.

Our Decision

[15] This appeal relates to a decision after a full trial. Accordingly, it falls upon this court to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, this court is entitled to examine the process of evaluation of the evidence by the trial court. The requirement for the trial judge to have made a decision which was 'plainly wrong' before an appellate court may intervene is well settled in our appellate jurisprudence and practice. This strict requirement underscores the rationale that the appellate court should not reverse or disturb the trial judge's finding even if the appellate court is of the view that it would not have arrived at the same conclusion as the trial judge did on the evidence on the record before it.

[16] A plainly wrong decision occurs when it can be shown that there is insufficient judicial appreciation of evidence by the trial court; the requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appellate court considered that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

[17] Whilst the aforesaid principles are well-settled, it may be appropriate to consider some instances where a decision may be described as perverse such that the judgment cannot be explained or justified by the special advantage enjoyed by the trial judge by reason of him having seen and heard the witnesses testify and being tested before him. Some instances

demonstrative of such occasions on the part of the trial judge include the following. It should be noted, however, that the following instances are not meant to be exhaustive.

(i) Misdirected itself on the evidence;

(ii) Failed to judicially appreciate the evidence;

(iii) Failed to consider any material evidence;

(iv) Acted on some irrelevant evidence so as to render the decision wholly erroneous;

(v) Made wrong inference from facts;

(vi) Misapprehended the facts; or

(vii) Gave reasons which are unsatisfactory or contradictory of each other.

[18] In essence, the defendants' arguments are mounted on the premise that (i) the learned JC failed to appreciate the application of cls. 9.1 and 9.2 as opposed to cl. 10.7 of the JVA, and (ii) that the learned JC also failed to appreciate the scope and application of cl. 9.3 of the JVA. As the determination of this issue falls on the proper construction to be given to cl. 9.3 of the JVA and cl. 2.11 of the SJVA, we think it is necessary to reproduce the following clauses.

Clause 9.1 Of The JVA

This agreement shall be terminated upon the happening of the following events:

(i) Upon the developer being in breach or in default of its obligations in any manner howsoever arising or whether by reason of any failure or neglect to act or comply or observe with any of its obligations in this agreement.

(ii) Upon the developer having delayed in the performance of its obligations in accordance with the provisions of this agreement for whatsoever reasons and including but not limited to the developer having failed to commence the construction under the development by the commencement date and/or the developer having failed to complete the construction of the entire residential and/or commercial units under the development by the completion date (unless the completion date is extended pursuant to cl. 3.27 herein).

(iii) Upon the progress of the development herein having been delayed or suspended for a period exceeding six months after commencement of the construction of the development by the commencement date or earlier.

(iv) Upon the development herein being abandoned by cessation of construction works for a period exceeding thirty days, arising from any reason whatsoever.

(v) Upon the developer having gone into liquidation (whether voluntary or compulsory) or having gone into a restructuring or amalgamation or being put under receivership, for whatsoever reasons.

Clause 9.2 Of The JVA

The events relating to termination of this agreement as set out in cl. 9.1 above shall be in addition to any other right or rights of termination available to the proprietors in law by reason of any breach of the terms or provisions of this agreement or otherwise howsoever arising and including any other rights and remedies as shall be available in law to the proprietors to effect termination of this agreement. In the event of termination of this agreement pursuant to cl. 9.1 herein or otherwise as provided in this clause, the parties hereby declare and agree that the following consequences shall apply:

(i) the developer's rights under this agreement shall cease forthwith and deemed revoked and the obligations of the developer as stipulated in this agreement shall no longer be effective nor enforceable and thereupon this agreement shall be taken to have been discharged for all legal intents and purposes;

(ii) the developer's right of entry or possession or occupation of the land shall be deemed to have been terminated (including the right of possession or occupation held by any person who has derived the same from the consent or license so given by the developer whose right thereof shall consequently be deemed to have been terminated). In such an event, the developer and any such other persons shall, in failing to give immediate vacant possession to proprietors, be treated as being in occupation unlawfully and/or as trespassers of the land;

(iii) the developer shall henceforth have no right to hold any title documents relating to the land and the title documents so held in the developer's possession shall be surrendered forthwith to the proprietors, regardless of whether or not the units intended to be built or so built under the development have been sold to prospective purchasers;

(iv) the developer shall also surrender forthwith to the proprietors all documents, including but not limited to the approved plans, drawings and other data or records, relating to the development and also copies of all the sale and purchase agreements and/or deeds of assignments relating to the units sold to purchasers relating to the development, for the proprietors to take over and/or continue with the development;

(v) the Power of Attorney granted pursuant to this agreement shall be revoked forthwith upon the proprietors giving the notice of revocation or termination to that effect to the developer;

(vi) the developer shall remove or cause to remove all machineries, building materials, tools, workers, contractors on the site and all other encumbrances found on the land (including any caveats entered on the land or any part thereof by the developer or any person during the subsistence of this agreement;

(vii) the developer shall compensate and/or refund to all purchasers and/or the financiers of the purchasers the monies collected and/or received whether or not there shall be termination of the sale and purchase agreements entered into with the purchasers in respect of the units sold under the development (subject to the developer indemnifying the proprietors in respect of any such claims (including the costs, expense and/or any other sums or damages sought by such purchasers) if so claimed by such purchasers and/or the financiers of such purchasers howsoever relating to the units sold under the development);

(viii) the developer shall pay all costs expenses and/or other sums that shall remain unpaid or due or outstanding to the consultants so appointed for the development (including but not limited to architects, surveyors and engineers) and to the contractors or workers or agents of the developer relating to the development (subject to the developer indemnifying the proprietors in respect of any such claims (including the costs, expenses and/or any other sums or damages sought by all such persons) howsoever arising in respect of the development);

(ix) the developer shall pay all costs expenses and/or other sums that shall remain unpaid or due or outstanding in respect of premiums, penalties, quit rents, assessments or any other charges or taxes payable, howsoever relating to the development (subject to the developer indemnifying the proprietors in respect of any such claims (including the costs, expenses and/or any other sums or damages sought as due and payable in respect thereof)

And thereupon this agreement shall become null and void and be of no further effect, and save as stated above herein, neither party shall have any further rights and/or claims against the other in respect of this agreement except for the provision for making the refund as provided in cl. 9.3. for avoidance of doubt, upon such termination as set out herein above, the developer shall have no further right, interest or claim over the land and/or the construction (whether partially or wholly completed) under the development and/or over the residential and/or commercial units so constructed partially or wholly under the development and the proprietors shall be deemed to have acquired all rights and/or benefits

lawfully and properly under the development in respect of works done and/or building units completed or otherwise without the proprietors being required to make any form of compensation to the developer and the developer shall be deemed to have waived and relinquished the rights and/or benefits that have accrued under the development howsoever (except for the developer's entitlement to be refunded of the sum referred to and as provided under cl. 9.3 herein).

Clause 9.3 Of The JVA

Upon the happening of the event of a default or breach or non-compliance with the developer's obligations under the agreement, resulting in the developer's failure to commence the construction works under the development before the commencement date (notwithstanding the happening of such terminable events), the developer shall be entitled to give a written notice to the proprietors of its intention not to continue with the development (provided such a written notice shall be given during a period not exceeding 30 days before the said expiry of the commencement date). Upon receipt of such written notice by the proprietors, the developer shall in exchange of surrendering all documents (not limited to titles, drawing, plans and others) relating to the development and upon handing over vacant possession of the land to the proprietors, be entitled to refund the deposit sum of Ringgit Two Million (RM2,000,000) only referred to in the second schedule hereto) and which sum shall be refunded to the developer (without payment of any interest sum thereto) within six months after the date of receipt of the said written notice by the proprietors from the developer.

Clause 2.11 Of The SJVA

Clause 9.3 is agreed to be varied by both parties that "upon the happening of the event of a default or breach or *non-approval of application to the relevant authorities,* non-compliance with the developer's obligations under this agreement, resulting in the developer's failure to commence the construction works under the development before the commencement date (notwithstanding the happening of such terminable events), the developer shall be entitled to give a written notice to the proprietors of its intention not to continue with the development (provided such a written notice shall be given during a period not exceeding 30 days before the said expiry of the commencement date). Upon receipt of such written notice by the proprietors, the developer shall in exchange of surrendering all documents (not limited to titles, drawing, plans and others) relating to the development and upon handing over vacant possession of the land to the proprietors, be entitled to refund the deposit sum of Ringgit Two Million (RM2,000,000) only referred to in the second schedule hereto) and which sum shall be refunded to the developer (without payment of any interest sum thereto) within six months after the date of receipt of the said written notice by the proprietors from the developer. *In the event*

A *the proprietors shall fail neglect or refuse to refund any monies required to be refunded or paid to the developer within the time stipulated for refund or payment under the terms of this agreement the proprietors shall be additionally liable to pay to the developer interest at a rate equivalent to the current prevailing Base Lending Rate (BLR) charged by the Malayan Banking Berhad (MBB) plus 1% (for the purposes of this Supplementary Agreement, current prevailing BLR means the current rate at*
B *the date of receipt of notification by the proprietors from the developer), calculated on a day to day basis calculated from the date due for refund or payment, as the case may be, until the date of receipt of the full refund or payment by the developer.*

[19] As a starting point, we will deal with the issue of the validity of the notice of termination. If as argued by learned counsel for the plaintiff that
C the notice of termination was issued pursuant to cl. 2.11 of the SJVA and cl. 9.1 of the JVA, then pursuant to cl. 9.3 of the JVA, the notice of termination must be given "during a period not exceeding 30 days before the said expiry of the commencement date". The commencement date is defined as a period of two years from the effective date; the effective date is in turn
D defined as the date when the duly executed PA shall be given to the plaintiff. On the established facts, it is quite clear that the commencement date fell at the earliest in April 2013 (after the first PA was delivered) or at the latest in August 2013 (after the second PA was delivered). As such, it follows that the two-year period from the effective date would expire in April 2015 at the
E earliest or at the latest in August 2015. At any rate, it is clear that the notice of termination must be given by the plaintiff to the defendants on or by August 2015. In this instance, however, the notice of termination was only given on 27 April 2016 – seven months after the expiry of the commencement date. It follows that the notice of termination was given out
F of time and is therefore invalid and of no effect. On these incontrovertible facts, we fail to see how the learned JC could have arrived at her finding without misdirecting herself on the evidence. This is an instance where the trial court has misapprehended the facts so as to arrive at a finding which is plainly wrong. For the foregoing reasons, we agree with the defendant's argument that the notice of termination is bad in law and in fact and is
G therefore invalid.

[20] The plaintiff also sought to rely on cl. 10.7(b) of the JVA which they contend gives them the option to terminate the JVA. Clause 10.7(b) of the JVA is as follows:

H It is hereby agreed and declared in this agreement it is incumbent upon the developer:

(a) to obtain the detailed planning permission and consent under building regulations and consent under building regulations and by-laws in accordance with the application for such permission or

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consent in respect of the land without conditions or with such conditions as the developer at its sole discretion is prepared to accept and the proprietors shall assist the developer to obtain the same whenever possible;

(b) in the event of such planning consent written approval and other such matters referred to in (a) above not being obtained or fulfilled within the periods stated in cl. 3.3, 3.4 and 3.5 above (or such extended time as may be agreed) then the developer shall have option to terminate this agreement by notice in writing to the proprietors within one month of such failure and neither party shall have any claim whatsoever against the other save and except for any antecedent breach:

(c) …

(d) …

[21] Having taken a clear and unequivocal position in their notice of termination, we do not think that it is open to the plaintiff to change their stance and now rely on cl. 10.7 of the JVA as the premise for the issuance of the notice of termination. Our view is fortified by the fact that cl. 10.7 is also not a pleaded point in the plaintiff's pleadings as the basis for terminating the JVA.

[22] We now turn to the issue of whether the plaintiff is entitled to the refund of the RM2m deposit sum pursuant to cl. 9.3 of the JVA. Clause 9.3 provides that the deposit sum shall be refunded to the plaintiff within six months after receipt of the plaintiff's notice of its intention not to continue with the development "… provided such a written notice shall be given during a period not exceeding 30 days before the said expiry of the commencement date". As the notice of termination was issued out of time, we do not think that the plaintiff being a party in breach can avail itself of the benefit of cl. 9.3 so as to be entitled to the refund of the deposit sum. We are constrained to hold that the learned JC erred in arriving at her finding on these established facts.

[23] The final issue relates to the defendants' counterclaim for damages to be assessed pursuant to cl. 9.5 of the JVA which reads as follows:

Clause 9.5 of the JVA

Notwithstanding the rights and remedies provided to the proprietors under the joint venture agreement, in the event the developer fails to perform any of its obligations (or is in breach thereof) under the joint venture agreement and/or this supplementary agreement, the proprietors shall be entitled to claim damages to the extent of the sum equivalent to the market value of the units of the proprietors' entitlement as defined in the joint venture agreement.

[24] As found by the learned JC, the plaintiff committed a breach of cl. 9.1 because the plaintiff failed to obtain the approvals from the relevant authority for the development. However, it is also provided under cl. 9.2 of the JVA that in event of termination of the JVA pursuant to cl. 9.1 that neither party shall have any further rights and/or claims against the other in respect of the JVA. In fact, the only other provision on damages under the JVA is cl. 9.5 which in the circumstances of this case can only apply after the development order and building plans have been approved by the relevant authorities. We also considered the fact that the defendants *qua* proprietors of the land forfeited the RM2m deposit sum paid by the plaintiff and, more importantly, the defendants did not lose the ownership and possession of their land.

[25] For the foregoing reasons, the defendants' appeal is allowed. The plaintiff is not entitled to the refund of the deposit sum as the notice of termination was given out of time and was null and of no effect. The orders of the learned JC granting the declaration that the JVA and SJVA have been validly terminated and ordering the refund of the deposit sum to the plaintiff are set aside. In the same breath, we also allow the plaintiff's appeal as it is clearly provided under cl. 9.2 of the JVA that there shall be no further right or claim; the only other provision on damages being cl. 9.5 which in the circumstances of this case can only apply once the development order and building plans have been approved by the relevant authorities. The order of the learned JC allowing the defendants' counterclaim and for damages to be assessed is also set aside. We made no order as to costs in this appeal.